

UNITED STATES BANKRUPTCY COURT
for the
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES COURTHOUSE AND FEDERAL BUILDING
280 SOUTH FIRST STREET, ROOM 3035
SAN JOSE, CALIFORNIA 95113-3099

MARILYN MORGAN
UNITED STATES BANKRUPTCY JUDGE

TELEPHONE (408) 535-5100

GUIDELINES FOR MOTIONS FOR RELIEF FROM STAY

Decisions in the relief from stay context are equitable decisions. I take into consideration the numbers involved, which include the value of the property, the amount of debt against the property, the amount of the pre-petition default and the post-petition default, whether property values are appreciating or depreciating, realistic prospects for sale or refinance, and the amount of the equity cushion. However, a multitude of other factors are also significant, such as the length of time the case has been pending, the debtor's efforts to reorganize, the debtor's employability and stability in the job, whether other family members are contributing to the debtor's efforts or are dependent upon the debtor, what caused a post-petition default and whether the situation is on-going or resolved, and so on. As a result, it is difficult to generalize about results in the relief from stay context.

Nonetheless, I try to provide consistency and predictability in hopes that lawyers may better advise their clients and negotiate consensual resolutions. I expect all counsel to come to the podium fully informed about their cases, having communicated both with their clients and with opposing counsel. I expect to rule at the first hearing unless there is a material fact in dispute.

To assist counsel, I am providing the following guidelines indicating how I am likely to rule in most situations.

RESIDENTIAL REAL ESTATE

CHAPTER 7

1. If the property is the debtor's residence and there is significant equity, relief is granted effective the day after the last day for filing complaints objecting to discharge. The stay is modified to allow scheduling the sale in accordance with the relief granted.
2. In other situations, unless the trustee opposes the motion, it will generally be granted.

CHAPTER 13

3. If there was no post-petition default when the motion was filed, it will be denied.

4. If Notice of Default is not yet filed, relief is granted to post a Notice of Default only (even if the default was cured before the hearing and assuming there is a pre-petition default). If the post-petition default is not cured within the 90 day notice period, the moving party may restore the motion to calendar on 10 days' notice to the debtor and the debtor's counsel. A new motion and filing fee are not required.
5. Curing Post-Petition Defaults: I expect counsel for the debtor to present a proposal for curing defaults. In considering a proposal, the most important factors to me are the amount and reason for the defaults, the equity cushion, the debtor's pre-petition conduct, the length of time the case has been pending and the length of time proposed for the cure.
6. If there is a large equity cushion, generally the adequate protection order will not be self-executing and requests for further relief in the future require the motion being restored to calendar on 10 days notice to the debtor and debtor's counsel. This is because there may be other creditor interests to protect and to assure that the debtor has an opportunity to sell or refinance if current payments cannot be made.
7. If the equity cushion is small, generally the order is self-executing, shifting the risk of non-performance to the debtor.
8. Accounting Disputes: I expect counsel to work together in good faith to resolve accounting questions. A continuance will be granted for this purpose.
9. If there is no insurance, the debtor must provide proof of homeowner's insurance within 10 days of the preliminary hearing or relief is granted. This becomes a permanent order for the remainder of the case. In the event of a future lapse, a 10 day notice by letter is given to the debtor and the debtor's attorney and, if not cured, relief is granted.
10. Property Taxes: The debtor must pay post-petition property taxes timely.
11. Attorneys' Fees are generally paid through the plan by amendment to the proof of claim. However, payment of moving party's attorneys' fees may be required as part of the cure in order to impress upon the debtor that delayed payment becomes expensive.
12. Civil Code § 2924g(d): Where I establish a future date for the termination of the automatic stay, a "drop dead" date, the seven day waiting period provided for in California Civil Code § 2924g(d) will be considered waived provided that the original written order on the motion contains a specific reference to the waiver of the section.
13. If Notice of Trustee's Sale has already been published, moving party should come to court prepared to indicate the new sale date. The order should specify the new sale date.

14. Ex Parte Orders Following Default: Where an adequate protection order provides for a future order terminating the automatic stay to be obtained on an ex parte basis upon the default, or uncured default, of the debtor, a request for the future order will only be granted when the request is accompanied by a proof of service reflecting service of the request, the declaration setting forth the default and the proposed order on the debtor and the debtor's counsel. A file stamped copy of the adequate protection order providing for the ex parte request must be attached to the declaration setting forth the default. If unaccompanied by a proof of service, the proposed order will not be signed.
15. Relief Granted to Senior Secured Creditor: Where a senior secured creditor is given relief to actually conduct a foreclosure sale, relief will also be granted to a junior secured creditor. Noticed hearing or restoration to the calendar is still required, however.
16. If more than one property is collateralized by the same loan, generally the order will allow relief for only one property at a time.
17. Repeat Filings do not automatically trigger a different result. The most important factors considered are the number of filings, the length of time between the dismissal of a previous case and the filing of a new case, the reason for the subsequent filing and whether stay relief was sought or granted in the previous case. When it appears the system is being abused, relief will be granted.
18. If there is little or no equity cushion, but the moving party's position is improving, generally complete relief will not be granted. In case of a future default, the order will be self-executing to shift the risk of loss to the debtor.

VEHICLES

CHAPTER 7

19. Unless the trustee opposes the motion, relief is generally granted.

CHAPTER 13

20. If there is no insurance, generally relief is granted if a binder is not provided to the moving party within 48 hours of the hearing. This becomes a permanent order for the remainder of the case. In the event of a future lapse, a 10 day notice by letter is given to the debtor and the debtor's attorney and, if not cured, relief is granted.
21. If payments are not made as provided by the plan, generally relief depends upon whether adequate protection payments are made (determined by depreciation of the vehicle as shown in the Kelly Blue Book).

UNLAWFUL DETAINER ACTIONS

22. Notice will be shortened to three days (excluding Sundays and holidays) by first class mail. (E.g., mail Friday for hearing on Wednesday; mail Monday for hearing on Thursday; mail Thursday for hearing on Tuesday [assumes no holiday]). The motion can be placed on any available calendar.
23. If involving a month-to-month tenancy on an apartment or single family residence: the motion will be granted.

PROCEEDING AGAINST INSURANCE COVERAGE

24. If relief is requested to pursue insurance coverage, the stay is modified to liquidate the claim or pursue insurance coverage, but remains in effect to prohibit execution upon the debtor or property of the estate without further order of the court. The stay does not prohibit the obtaining of the judgment in excess of insurance coverage or the filing of a proof of claim.

ASSUMPTIONS MADE BY THE COURT

Unless parties indicate to the contrary, the court makes the following assumptions:

25. Continued Hearings - Stay Remains in Effect. Where the preliminary hearing is continued for either a further preliminary hearing or a final hearing, the automatic stay remains in effect.
26. Time to Cure Default. Where an adequate protection order establishes a procedure for the curing of a future default after notice to the debtor and the debtor's counsel, the time to cure (for example, ten days) is calculated pursuant to Fed.R.Bankr.P. 9006. The first day for counting purposes shall be the day following the day when the notice is mailed.
27. Partial Cure of Default. Where the adequate protection order establishes a procedure for the curing of a future default after notice to the debtor and the debtor's counsel, and the creditor accepts partial payment after issuing the notice, the creditor must issue a new notice in order to proceed.
28. Payment Accepted After Order Granting Relief Obtained. When a creditor accepts payment after obtaining an order granting complete relief to foreclose, the creditor is presumed to have agreed not to enforce that order at any time. The creditor should request that I vacate the order and proceed in accordance with the original adequate protection order in the event of a future default.

29. Attorneys' Fees. Unless a specific ruling is made at the time of a hearing, attorneys' fees which may be claimed under 11 U.S.C. § 506 are subject to subsequent objection as to reasonableness.
30. Trustees. Any order for relief will only be effective against parties who were served with the original motion. If a trustee was not served with a motion, the trustee will not be bound by the terms of the order for relief.
31. Real Property - Continuing Trustee's Sales. Where a trustee's sale has been noticed prior to the filing of a bankruptcy petition, the sale may be continued under California law or the laws of the state where the real property is located.
32. Real Property - Noticing Trustee's Sales. Where I modify the automatic stay to allow a creditor secured by real property to record and publish a notice of default, and the stay remains in effect to prohibit a trustee's sale without further order of the court, the recording and publishing of a notice of trustee's sale is also prohibited without further order.
33. Real Property - Adequate Protection Payments. Where adequate protection payments are made to a creditor secured by real property, and the secured creditor has previously recorded and published a notice of default or notice of trustee's sale, the secured creditor may accept the adequate protection payments. Receipt of payments shall not invalidate the notice of default or notice of trustee's sale previously recorded assuming it is otherwise valid.

SIGNING OF ORDERS

Proposed orders must be submitted in accordance with Bankruptcy Local Rules 9021-1 and 9022-1. Orders lodged in court at the conclusion of the hearing are normally processed and returned within three business days following submission. Orders submitted subsequent to the hearing will generally be lodged for 7 days after service unless approved as to form by the opposing party. While it is not required unless specifically ordered, I appreciate orders being approved as to form. Approval by opposing counsel can be by a facsimile signature page.